IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 281 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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POMBHABEN WD/O SHAKARCHAND - Appellant(s)
Versus
MANEKLAL P SHAH - Defendant(s)

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Appearance :
MR MEHUL S SHAH for Appellants
MR BY MANKAD for Respondent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 01/11/2006

ORAL JUDGMENT

1. Parties are finally heard.

2. Present is an appeal against the judgment and

decree dated 28th July, 1986, passed by the learned District Judge, Kutch at Bhuj in Regular Civil Appeal No.61 of 1983, confirming the judgment and decree dated 25th January, 1983, passed by the learned Civil Judge (S.D.), Bhuj in Regular Civil Suit No.125 of 1978 where-under the suit for redemption was dismissed by the learned trial Court on a preliminary issue holding that the suit was premature.

3. The short facts necessary for disposal of the present matter are that the suit property was mortgaged by the present appellant-plaintiff by a registered document on 20th April, 1947 for a period of 99 years. Before completion of the said period of 99 years, the plaintiffs came to file the suit on 9th May, 1970 for redemption of the property from the mortgage. The defendant appeared in the suit and in his written statement he submitted that the suit was premature or was not in time and was liable to be dismissed on that short count. He had also raised various other pleadings in support of his plea for dismissal of the suit.

4. The learned trial Court framed various issues including issue No.4 which reads :

"Whether the suit is in time ?"

The trial Court also framed the issue that "whether fixing of the period of 99 years was a clog on equity of redemption ?"

5. The trial Court held that the suit was filed beyond a period of 30 years from the date of the mortgage, therefore, it was barred by limitation.

6. In the appeal, the appellate Court held that after coming into force of Indian Limitation Act, 1963, the earlier period of 60 years was reduced to 30 years and as such the suit should have been filed before expiry of 30 years from the date of execution of the document. The appellate Court also held that the suit was barred by limitation. Being aggrieved by the said judgment and decree of the two Courts below, the appellants are before this Court.

7. The appeal has been admitted for hearing on the following substantial question of law.

> "Whether the lower Courts have committed a substantial error of law in holding that the suit was barred by limitation ?"

8. Shri Shah, learned counsel for the appellants, submits that present is a suit which has been filed

within 99 years, the period fixed in the mortgage deed, therefore, the suit cannot be said to be barred by limitation, according to him, the defence of the defendant could only be that the suit is premature.

9. On the other hand, learned counsel Shri Mankad submits that the present suit is bad because if the appellants say that it is a clog on the equity of redemption, then the suit ought to have been filed within 30 years from the date of writing and in case they file the suit beyond 30 years, then they must seek relief that period of 99 years fixed in the mortgage deed is a clog.

10. In a Full Bench judgment of this Court in the matter of *Sangar Gagu Dhula vs. Shah Laxmiben Tejshi & Ors.* reported in *2001 (2) G.L.H.* 643, Honourable the Chief Justice D.M.Dharmadhakari (as he then was) has observed that limitation to file a suit for redemption would arise only on expiry of period fixed in the mortgage deed and in case anybody proposes to file a suit before expiry of the period fixed in the mortgage deed, then he will have to say that fixation of the period amounts to a clog on the equity of redemption.The Court had observed that “the

condition in a mortgage deed which is found to be clog on the equity of redemption is *ab initio* void or invalid but it is not so in absolute sense, meaning that it would become so only upon the mortgagor resorting to remedy in a Court of law and on the Court, in the facts and circumstances of the case, coming to the conclusion that the condition in the mortgage deed is clog on the equity of redemption." The Court also observed that "where a condition in the mortgage deed is a clog on the equity of redemption, period of limitation under Art.61 (a) for filing suit of redemption can never commence from the date of execution of the mortgage deed but would commence from the date the court holds that period of redemption fixed in the mortgage deed of unreasonably long period of time is a clog on the equity of redemption. Period of limitation would, therefore, commence from the date of declaration of such conditions as a clog by the Court."

11. In the present matter, undisputedly the period of 99 years has been fixed in the document and the suit has been filed within the said period of 99 years. The plaintiffs have also submitted that the

period of 99 years is a clog on the equity of redemption and under the circumstances a decree for redemption be granted in favour of the plaintiffs. The Court had cast a issue to that effect, but without any decision on the issue that period of 99 years is a clog or not the Court proceeded to decide the question of limitation.

12. The question of limitation ordinarily would be a pure question of law, but in the present case, the question could not be decided in favour of the defendant because the plaintiffs were always entitled to file the suit even after 99 years or within the period of 99 years seeking relief of redemption in accordance with the observations made by the Full Bench of this Court in the case of *Sangar Gagu Dhula* (Supra).

13. It is held that the suit is not barred by limitation. The judgment and decree passed by the trial Court and confirmed by the learned first appellate Court are accordingly set aside and the matter is remanded to the learned trial Court for its disposal in accordance with law.

14. The trial Court shall be obliged to give proper

opportunity to the parties to lead evidence so that it may record its findings on the question that whether period of 99 years amounts to clog on the equity of redemption and if not, whether the suit is premature and if yes, whether the plaintiffs are entitled to a decree.

15. The appeal is allowed. It is however, directed that the plaintiffs would be entitled to refund of the court fees of both the Courts because the learned trial Court had decided the suit on a preliminary issue and the findings were confirmed by the appellate Court. The Registry of this Court is directed to issue necessary certificate in accordance with the provisions of Indian Court Fees Act for refund of court fees of two courts. Let a decree be framed accordingly.

(R.S.GARG, J.)

*mithabhai